SUPREME COURT, U. S.

No. 71-1280

FILED

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MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1971

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THE SCHOOL TOWN OF SPEEDWAY, INDIANA, ET AL.,
PETITIONERS

*v.*

HONORABLE S. HUGH DILLIN, UNITED STATES
DISTRICT JUDGE, UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1971

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No. 71-1260

THE SCHOOL TOWN OF SPEEDWAY, INDIANA, ET AL., PETITIONERS

*v.*

HONORABLE S. HUGH DILLIN, UNITED STATES DISTRICT JUDGE, UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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This case arises as an adjunct to the Indianapolis school desegregation litigation, which was commenced by the United States in 1968 and came to trial before the respondent district judge in July 1971. The petition for a writ of certiorari seeks review of the court of appeals' denial (Pet. App. A1-A2) of petitioners' application for a writ of prohibition and

mandamus to vacate certain orders of the district court entered after a notice of appeal had been filed seeking review of an interlocutory decree of the district court.

On August 18, 1971, the district court issued a decision (Pet. App. A3-A55) sustaining the allegations of discrimination in assignment of students and faculty by the defendants,[1] enjoining further racial discrimination in the operation of the Indianapolis school system, and requiring the defendants to take certain specified interim steps "to fulfill their affirmative duty to achieve a nondiscriminatory school system" (Pet. App. A52).

In its opinion, however, the court stated that an effective and workable final plan of desegregation might be impossible if relief were confined to the geographical area under the jurisdiction of the original defendants. To shape a final remedy, therefore, the court called for further proceedings and directed the United States to prepare and file the necessary pleadings to secure the joinder of municipal and school corporations in the surrounding area, including the petitioners herein, as additional parties defendant. The court also suggested that, in view of its decision, other individuals and bodies politic might wish to seek intervention in the proceeding (Pet. App. A48-A51).

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[1] The defendants in the original litigation were the Board of School Commissioners of Indianapolis, Indiana, the members of that Board, and its appointed Superintendant of Schools.

Additional parties defendant, including petitioners, were joined by order entered September 7, 1971 (App. A, *infra*). On September 10, 1971, the original defendants filed a notice of appeal from the August 18 decision of the district court, pursuant to 28 U.S.C. 1292(a)(1). That appeal has been briefed and is presently awaiting oral argument in the court of appeals.

On September 14, 1971, after the filing of the notice of appeal, two black students in the Indianapolis public schools filed a motion to intervene as plaintiffs, together with a class action complaint in intervention. This complaint was in two counts. The first count alleged that certain Indiana statutes effecting a governmental reorganization in Indianapolis were unconstitutional as racially discriminatory because schools were excluded from the consolidated metropolitan government; and prayed for an order consolidating the Indianapolis school system with the surrounding school corporations. The second count alleged and sought relief from racial discrimination by the State and by local school authorities in the operation of the public schools of Indianapolis and the surrounding school corporations. The complaint in intervention was directed against the original defendants, the defendants previously added pursuant to the order of September 7, 1971, and several additional state and local school authorities. The motion to intervene was granted on the day it was filed (App. B, *infra*).

The additional defendants filed various motions in the district court seeking to dismiss both their joinder and the complaint in intervention on a variety of grounds. After a conference with counsel for all parties, the district court overruled these motions on December 30, 1971 (App. C, *infra*).

Meanwhile, several of the added defendants applied to the court of appeals for writs of prohibition or mandamus to vacate the joinder and intervention orders. There were three such efforts to obtain extraordinary relief, each of which was summarily denied by the court of appeals. The present petition seeks review of that court's last order, entered on February 2, 1972, refusing to direct the district court to dismiss the complaint of the intervening plaintiffs; the previous orders which are not at issue here are set forth in Apps. D and E, *infra*, pp. 16-19 (Pet. App. A1-A2).[2]

The essence of petitioners' contention is that, with the filing of the notice of appeal, the district court lost jurisdiction to allow the additional plaintiffs to intervene and to consider the matters raised in their complaint, notwithstanding that these were the very matters specifically designated for further consideration in the court's August 18 opinion. In effect, petitioners are challenging the power of the district

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[2] The questions of petitioners' liability, if any, under the Fourteenth Amendment or of the remedy to be applied to them are not involved here. Those issues remain to be litigated below in proceedings in which petitioners will be represented and will have an opportunity for appellate review of any remedial order entered against them.

court to launch its consideration of final remedies until appellate review of the finding of discrimination and the grant of interim, partial relief is brought to a conclusion. This contention is wholly without merit, for the following reasons:

1. The principle of divestiture of jurisdiction that petitioners invoke is normally inapplicable to interlocutory appeals. *Ex parte National Enameling & Stamping Co.*, 201 U.S. 156; *Janousek* v. *Doyle*, 313 F. 2d 916 (C.A. 8); *Phelan* v. *Taitano*, 233 F. 2d 117 (C.A. 9). In cases where an interlocutory appeal has been taken, the district court is free to proceed with aspects of the litigation that are not the subject of the appeal. *DePinto* v. *Provident Security Life Ins. Co.*, 374 F. 2d 50, 51 n.2 (C.A. 9), certiorari denied, 389 U.S. 822; *McCann* v. *Kerner*, 436 F. 2d 1342 (C.A. 7); *Hamer* v. *Campbell*, 358 F. 2d 215, 223-224 (C.A. 5), certiorari denied, 385 U.S. 851; 9 MOORE'S FEDERAL PRACTICE ¶ 203.11, at pp. 738-739. The cases relied upon by petitioners (Pet. 7-8) involve either appeals of final judgments or actions by the district court pertaining to the very issues on review in the court of appeals and impinging on the latter court's exercise of its jurisdiction.[3] In the present case, the intervention was for the spe-

[3] For example, in *Borgmeier* v. *Stone*, 233 F. 2d 818 (C.A. 7), the court of appeals issued a writ of prohibition to prevent a district court from acting to dismiss an appeal. Similarly, in *Hobson* v. *Hansen*, 44 F.R.D. 18 (D.D.C.), a notice of appeal from a final order had been filed, and intervention was sought in the district court to permit participation in the appeal on the issues adjudicated by the order being appealed.

cific purpose of litigating the final remedy issues reserved by the district court for further proceedings in its August 18 order; [4] it was unrelated to the particular findings of discrimination and the partial injunctive relief that were the subject of the appeal.

2. The well established general principles discussed above apply with special force to school desegregation litigation, which by its nature often requires continuing district court supervision. In cases such as the present one, where some immediate relief is clearly called for but the shape of the final remedy is uncertain, petitioners would require the district court either to forego the granting of interim relief in order to proceed with expeditious consideration of a final order, or to defer consideration of the final remedy while time-consuming appellate litigation is conducted. Compare *Alexander* v. *Board of Education*, 396 U.S. 19.

Accordingly, the court of appeals for the Fifth Circuit has, like the court below, resolved the specific issue raised by this petition adversely to petitioners' position. In denying a petition for a writ of prohibition against a district court's allowance of intervention by black students in a school desegregation case after a notice of appeal had been filed, that court observed that "the continuing development of the law requires the district court to retain jurisdiction of

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[4] In its order of September 14, 1971, the district court noted that the complaint in intervention "furnishes an orderly framework for the parties to address themselves to such legal issues." (App. B, *infra*, p. 12.)

the cause even though there may be an appeal from a particular 'final order'." *United States* v. *Choctaw County Board of Education*, 417 F. 2d 838, 844. See also *Plaquemines Parish Commission Council* v. *United States*, 416 F. 2d 952, 954 (C.A. 5); cf. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 399 U.S. 926; *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290, 292 (Harlan, J., concurring).

3. The relief sought by petitioner would be an exercise in futility in any event, since the intervening plaintiffs are entitled to file their complaint independently if it is denied consideration in this case. Should that happen, the district court's rules would call for assignment of the matter to Judge Dillin, who would be free to consider the issues raised just as he is now doing. General Order on Number and Assignment of Cases, Southern District of Indiana, September 10, 1954, ¶ 3(b), as amended; cf. Rule 42(a), Fed. R. Civ. P.

4. Extraordinary remedies are reserved for really extraordinary cases, *Ex parte Fahey*, 332 U.S. 258, 259-260, and are not an appropriate means to review the exercise of discretion by the district court in cases such as this. Nor is there any reason for this Court to interfere with the court of appeals' proper exercise of its discretion in its refusal to issue the requested extraordinary writs here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

DAVID L. NORMAN,
*Assistant Attorney General.*

ANDREW L. FREY,
*Assistant to the Solicitor General.*

BRIAN K. LANDSBERG,
JOHN D. LESHY,
*Attorneys.*

JUNE 1972.

## APPENDIX A

## IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION

No. IP 68-C-225

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL., DEFENDANTS,

THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA, THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA, THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA, THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA, THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA, THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA, THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, THE BEECH GROVE CITY SCHOOLS, MARION COUNTY, INDIANA, THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA, THE CARMEL CLAY SCHOOLS, HAMILTON COUNTY, INDIANA, THE GREENWOOD COMMUNITY SCHOOL CORPORATION, JOHNSON COUNTY, INDIANA, Added Defendants.

## ORDER

This Court, having considered the Motion of the Plaintiff United States to add as parties defendant the school corporations listed herein, in accordance with the previous Order of this Court entered August 18, 1971,

HEREBY ORDERS that the following school corporations, organized and existing under the laws of the State of Indiana, are joined as parties defendant in this action for the purpose of assisting this Court in the resolution of the legal issues raised in this Court's August 18, 1971 Order: The Metropolitan School District of Decatur Township, The Franklin Township Community School Corporation, The Metropolitan School District of Lawrence Township, The Metropolitan School District of Perry Township, The Metropolitan School District of Pike Township, The Metropolitan School District of Warren Township, The Metropolitan School District of Washington Township, The Metropolitan School District of Wayne Township, The Beech Grove City Schools, The School Town of Speedway, all in Marion County, Indiana and The Carmel Clay Schools, Hamilton County, Indiana, and The Greenwood Community School Corporation, Johnson County, Indiana.

This 7th day of September, 1971.

/s/ S. Hugh Dillin
United States District Judge

## APPENDIX B

## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF INDIANA
## INDIANAPOLIS DIVISION

### NO. IP 68-C-225

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., DEFENDANTS

### ORDER ON PETITION TO INTERVENE

This cause came before the Court on the petition of DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY to intervene in this action as party plaintiffs in their own right and as representatives of a class comprised of Negro school age children residing in Marion County, Indiana, who have attended or are attending segregated schools.

The petition alleges that the interest of the plaintiffs and the class they seek to represent are not adequately represented by the plaintiff United States of America which, the petition alleges, has failed to prosecute this action against certain school districts and governmental agencies and authorities against who relief is required to redress petitioners' deprivation of equal protection of the laws.

The Court notes that on September 7, 1971 the United States, pursuant to order of the Court, moved to add certain additional school corporations as parties defendant. However, the United States failed or refused to assert or allege any claims against such added defendants, as to which they could reasonably

be expected or required to respond, or which would frame the legal issues whose resolution requires the presence of such additional parties.

The complaint of the intervening plaintiffs furnishes an orderly framework for the parties to address themselves to such legal issues. Furthermore, since the questions raised by intervening plaintiff's complaint, or flowing therefrom, are essentially legal in character and affect all members of the class equally, the court finds that a class action is superior to other methods for the fair and efficient adjudication of this matter.

It is therefore ORDERED:

1. That the petition to intervene be and the same is hereby granted, and the complaint in intervention is ordered filed instanter.

2. That the action of the intervening plaintiffs be maintained as a class action, and that notice thereof be given to members of the class as the Court shall hereafter order. This order shall be conditional subject to alteration or amendment as circumstances may require.

3. That the clerk issue summonses to the defendants named in the complain in intervention, and that the United States Marshal serve such summonses and complaints upon said defendants at the cost and expense of the United States, and make his due return thereon.

Dated this 14th day of September, 1971.

/s/ S. Hugh Dillin
S. HUGH DILLIN,
United States District Judge

## APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NO. IP 68-C-225

UNITED STATES OF AMERICA, PLAINTIFF,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, INTERVENING PLAINTIFFS,

*vs.*

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY INDIANAPOLIS, ET AL., DEFENDANTS,

EDGAR D. WHITCOMB, as Governor of the State of Indiana, Et Al,
Added Defendants.

ENTRY

The Court, having had under advisement various motions of the parties, and being fully advised, now makes the following rulings with respect thereto:

1. Certain motions filed by various parties defendant are each separately and severally overruled, as follows:

a. All motions to dismiss the amended complaint of the intervening plaintiffs.

b. All motions to sever and docket separately the amended complaint of the intervening plaintiffs.

c. All motions to stay proceedings on the amended complaint of the intervening plaintiffs pending the decision on appeal of the Court's judgment of August 18, 1971.

d. All motions for a more definite statement of the amended complaint of the intervening plaintiffs.

e. All motions requesting abstention on the part of the Court.

f. All motions to strike the amended complaint of the intervening plaintiffs.

g. All motions for determination that the cause of action stated in the amended complaint of the intervening plaintiffs is not maintainable as a class action.

2. The motion of the intervening plaintiffs for an order requiring that service be made of all pleadings by all parties defendant on counsel for intervening plaintiffs who reside without the District is granted, and it is so ordered.

The Court recognizes that the main thrust of the added defendants' various motions to dismiss the intervening plaintiffs' amended complaint, or to sever and redocket the same as a separate action is that they cannot be bound by the findings made in this cause before they were made parties. This position is valid. Therefore, the action of the Court in overruling such motions is without prejudice to the right of such added defendants, on trial, to offer evidence in defense of the issues raised in both the original complaint and the intervening complaint, as amended, and the burden of proof as to the issues raised by the intervening complaint shall continue to be on the intervening plaintiffs, unaided by the findings of the Court entered before joinder of the added defendants.

The Court, not being fully advised on the issue of whether or not a three-judge Court is required herein, will continue such matter under advisement. In

this connection the intervening plaintiffs are directed to file their brief in response to such motion on or before January 24, 1972.

Dated this 30th day of December, 1971.

/s/ S. Hugh Dillin
S. HUGH DILLIN,
Judge

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

A True Copy:
Teste:

/s/ Kenneth J. Carride
Clerk of the United States
Court of Appeals for the
Seventh Circuit

Monday, September 27, 1971

#13-097-4A

[DOCKETED OCT. 6, 1971, CIVIL RIGHTS]

Before

HON. LUTHER M. SWYGERT, Chief Judge
HON. ROGER J. KILEY, Circuit Judge
HON. ROBERT A. SPRECHER, Circuit Judge

No. 71-1695

AVON COMMUNITY SCHOOL CORPORATION, ET AL.,
PETITIONERS,

*vs.*

S. HUGH DILLIN, UNITED STATES DISTRICT JUDGE FOR
THE SOUTHERN DISTRICT OF INDIANA, RESPONDENT.

ORIGINAL PETITION FOR WRIT OF PROHIBITION.

This matter comes before the Court on the petition of Avon Community School Corporation, et al., and

Added Defendants Avon Community School Corporation, Brownsburg Community School Corporation and Plainfield Community School Corporation of Hendericks County, Indiana, for a writ of prohibition directed to respondent to oust him of jurisdiction to order petitioners to be added defendants in the original action brought by the United States as civil action No. IP 68-C-225 in the United States District Court for the Southern District of Indiana and for other relief.

This Court having considered the said petition for writ of prohibition, finds no persuasive reason given for granting of the extraordinary relief requested.

IT IS THEREFORE ORDERED AND ADJUDGED by this Court that the said petition for writ of prohibition be and the same is hereby denied.

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

A True Copy:
Teste:

/s/ Kenneth J. Carride
Clerk of the United States
Court of Appeals for the
Seventh Circuit

Friday, October 1, 1971

#13-097-4A

[DOCKETED OCT. 6, 1971, CIVIL RIGHTS]

Before

HON. LUTHER M. SWYGERT, Chief Judge
HON. ROGER J. KILEY, Circuit Judge
HON. THOMAS E. FAIRCHILD, Circuit Judge

No. 71-1702

CARMEL-CLAY SCHOOLS, PETITIONER,

*vs.*

HON. S. HUGH DILLIN, United States District Judge, etc., RESPONDENT.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division (IP-68C-205)

This matter comes before the Court on the petition of Carmel-Clay Schools for a writ of prohibition or

mandamus to command respondent to vacate his orders of September 7, 1971, and September 14, 1971, entered in case IP-68-225 entitled "United States of America, Plaintiff, vs. The Board of School Commissioners of the City of Indianapolis, Indiana, et al., Defendants," and for other relief. On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the said petition of Carmel-Clay Schools for a writ of prohibition or mandamus be and the same is hereby denied.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 466759 775